U.S. Department of Labor

Board of Alien Labor Certification Appeals
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DATE: November 10, 1999

CASE NO: 1998-INA-220

In the Matter of

MARGUERITE HOLMES
Employer

on behalf of

VILMA GLADYS ORELLANA
Alien

Appearances: Nikolaj-Klaus von Kreitor, Esq., Attorney for Employer

Certifying Officer: Dolores Dehaan, Region II

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Marguerite Holmes' ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able,

willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On May 28, 1996, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the State of New York Department of Labor, Alien Labor Certification Office ("NYDOL") on behalf of the Alien, Vilma Gladys Orellana. (AF 15). The job opportunity was listed as "cook". (Id.). The job duties were described as follows:

> Planing of menus and cooking Spanish and Italian-style dishes, dinners, desserts and other foods, according to recepes [sic] and instruction of the employer and other members of the household. Preparation of meats, soups, souces, [sic] vegetabl;es [sic] and other foods prior to cooking. Seasoning and cooking of foods. Baking of breads and pastries. Serving meals to the members of the household. Work schedule is from 7:30 A.M. to 5:30 P.M. with two free hours (1:30 P.M. to 3:30 P.M.) 5 days a week.

(Id.). The stated job requirements for the position, as set forth on the application, are 8 years of grade school and 2 years of experience in the job offered. (Id).

On September 11, 1996, and September 12, 1996, NYDOL transmitted the resumes of 2 U.S. applicants to the Employer. (AF 27-28). The Employer's Results of Recruitment Report, dated October 25, 1996, indicated that neither of the applicants was hired. (AF 46-48). The file was transmitted to the CO on December 24, 1996. (AF 53-55).

The CO issued a Notice of Findings ("NOF") on December 11, 1997, proposing to deny certification for four reasons. (AF 56-60). First, the CO found that it did not appear feasible that the job duties constituted full time employment in the context of the Employer's household. The Employer was instructed to rebut this finding by amending the job duties or by submitting evidence that the job constitutes full time employment and has been customarily required by the Employer. (AF 59). Second, the CO found that the requirement that applicants have two years of specialized experience in preparing Spanish and Italian-style food is unduly restrictive. The CO advised the

Employer to either delete the Spanish and Italian-style cooking requirement in the job description or document how the requirement arises from business necessity. (AF 58). Third, the CO stated that if the Employer deleted the restrictive requirement and indicated a willingness to readvertise, then the Employer's wage offer must equal or exceed the prevailing wage. The CO found the Employer's wage offer of $13.50 per hour was below the prevailing wage of $17.43 per hour made pursuant to the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 et seq. 29 C.F.R. Part 4. The Employer was instructed to increase the rate of pay or submit countervailing evidence that the prevailing wage determination was in error. (AF 57). Finally, the CO found that one U.S. applicant was rejected for non lawful job-related reasons. The CO found applicant Mark Garcia qualified for the position. (AF 56).

The Employer submitted its rebuttal on January 12, 1998. (AF 61-68). The Employer asserted that the position as performed in her household did constitute full time employment. The Employer also provided lawful job-related reasons for the rejection of Applicant Garcia. In addition, the Employer argued that the requirement of experience cooking Spanish and Italian-style food was justified by business necessity and also argued that the restrictive requirement issue should have been raised by the Department of Labor prior to the advertisement, "not after by the CO." (AF 62). The Employer argued that "the doctrine of estoppel precludes subsequent allegation." (Id.). The Employer did not address the issue of the prevailing wage.

On February 9, 1998, the CO issued a Final Determination ("FD") denying certification. (AF 69-71). The CO reviewed the Employer's rebuttal and found that the Employer adequately rebutted that the job duties constituted full time employment and adequately rebutted Section 20 C.F.R. 656.24(b)(2)(ii) finding that no U.S. applicant is able to perform in the normally acceptable manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed. (AF 70). The CO additionally found, however, that the Employer failed to adequately document that the requirement for two years experience in Spanish and Italian style cooking was based on business necessity. The CO found the Employer's reasons for justifying business necessity were not acceptable because the Employer "failed to document that an applicant with two years of cooking experience could not readily adapt to a Spanish and Italian style of cooking. ... Employer failed to document why employer, or anyone in her family, while unable to cook, cannot provide written recipes in the Spanish and Italian style cooking tradition." (Id.). The CO also found that the Employer failed to address the prevailing wage issue and therefore did not increase the wage offer to the prevailing wage or submit countervailing evidence that the prevailing wage determination was in error. (AF 69).

On March 14, 1998, the Employer filed a Request for Review of the Final Determination. (AF 72-80). The Employer argued that the experience requirement was based on business necessity citing *Teresita Tecson*, 94-INA-014 (May 30, 1995), and submitted a professional opinion of the "Executive ChefDeCuisine" of a Marriot Hotel who specializes in Spanish and Italian Cuisine. The Employer also argued that the prevailing wage at the time the of the recruitment was $13.50, not $17.43. The Employer asserted that the DOL adopted a new policy/rule in respect to the prevailing wage and was retroactively applying it to the Employer. Finally, the Employer argued that the CO

is estopped from making both of these findings due to the Employer's detrimental reliance on the acts and representations of the Department of Labor.

Discussion

Section 656.25(e) provides that the employer's rebuttal evidence must rebut all the findings in the NOF and that all findings not rebutted shall be deemed admitted. On this basis, the Board has held repeatedly that an employer's failure to address a deficiency noted in the NOF supports a denial of labor certification. *Belha Corporation (Four Corners Importers)*, 88-INA-24 (May 5, 1989) (*en banc*); *Oscar Basso*, 92-INA-173(May 28, 1993); *China Town Planning Council, Inc.*, 92-INA-247 (Apr. 28, 1993); *North Dakota State University*, 92-INA-84 (Feb. 23, 1993).

As set forth above, the Employer's rebuttal clearly failed to address the CO's determination of the prevailing wage. The NOF cited 20 C.F.R. § 656.20(c)(2) and 656.40, and found that the hourly wage of $13.50 was below the prevailing wage of $17.43. The NOF notified the Employer the Employer that she could rebut this finding by increasing her hourly wage offer to the level of the prevailing rate or, in the alternative, by submitting countervailing evidence that the was in error. (AF 57). The rebuttal expressly addressed the NOF issues regarding full-time employment, job-related reasons for rejection, and business necessity. (AF 61-67). The rebuttal did not mention the CO's finding that the Employer failed to comply with the requirement that she offer the prevailing wage, however, and offered no evidence challenging the CO's prevailing wage determination. *Sun Valley Co.*, 90-INA-391 and 90-INA-393 (Jan. 6, 1992).

The Employer argues in rebuttal and on appeal that the doctrine of estoppel applies and precludes subsequent allegations that were not raised by the Department of Labor prior to the advertisement of this job opportunity and were raised for the first time by the CO. We disagree. It is well settled that the CO is not bound by any statements or actions by the local employment service. *Peking Gourmet*, 88-INA-323 (May 11, 1989); *Aeronautical Marketing Corp.*, 88-INA-143 (Aug. 4, 1988). Even if a local job service does not find the employer's offered salary is below the prevailing wage, the CO can so find. *Haricon Industries, Inc.*, 94-INA-135 (May 26, 1995). The Employer was put on notice of the deficiencies in its application for labor certification in the NOF and was given the opportunity to rebut all findings of the CO.

We find that the Employer has offered no evidence of any kind to show that the CO's prevailing wage determination was in error, and thus she has failed to rebut the determination of the prevailing wage. Labor certification is properly denied on this issue alone, and thus no other issues need to be discussed. *Haricon Industries, Inc.*, *supra*; *Reliable Mortgage Consultants*, 92-INA-321 (Aug. 4, 1993).

Order

The Final Determination of the Certifying Officer denying the application for certification is AFFIRMED.

For the Panel:

DONALD B. JARVIS
Administrative Law Judge

San Francisco, California